able interest to maintain these caveats. In so holding the learned judge must necessarily have upheld the authenticity of the memorandum of transfer by virtue of which the respondent became the registered owner of Holding No. 31, but which memorandum was alleged by the vendor to be a forgery and the transfer was therefore invalid. This is a serious question of fact and law which should be gone into. The learned judge in coming to the conclusion as he did took for granted without questioning as authentically executed by the vendor the following documents:

(1) Memorandum of transfer dated July 7, 1978 and December 8, 1979 relating to Holding No. 31 and Holding No. 41 respectively,

(2) Statutory declaration dated June 15, 1978 purported to be sworn by the vendor that he had lost or misplaced without trace the issue document of title to Holding No. 31 in question and thus with the replaced document of title this holding became registered in the respondent's name,

(3) Letter dated August 12, 1978 addressed to Goh Soot Hwang & Co., Advocates & Solicitors purported to be signed by the vendor inquiring about his liability to Property Gains Tax on the sale of Holding No. 31 to the respondents,

(4) Notification of disposal of chargeable assets required under section 57 of the Real Property Gains Tax Act 1976 dated August 12, 1978 and December 8, 1978 in respect of Holding No. 31 and Holding No. 41 respectively, and

(5) A Hongkong & Shanghai Banking Corpn. cheque No. 535135 dated December 8, 1978 for $21,000 drawn by the respondent in favour of the vendor as part payment for the sale of Holding No. 41.

Prima facie these documents appear to have been executed by the vendor, but in view of the allegations of fraud raised by him, these documents should not be accepted on their face value. The cheque was made in the name of the vendor, but no photo copy of the reverse side of the cheque was displayed so as to show who signed it as cash recipient when the cheque was cashed. There was, however, a hearsay evidence to this effect in the affidavit of Encik Abdul Aziz bin Daud sworn on behalf of the respondent on January 25, 1980. Paragraph 8 of this affidavit says:

"8. Further Seet Tian Hock had on February 28, 1979 (this I learnt from our Bankers Hongkong & Shanghai Bank) after what he says the shock and surprise cleared our cheque marked 'AA 10' for $21,000 being the balance for purchase price of lot 41 which is in front of Lot 31."

In view of the allegations of fraud and the denial by the vendor that he sold these two holdings to the respondent, this hearsay evidence should not likewise be accepted.

The serious issue of fact and law to be tried in all these Originating Motions under appeal was one as to whether the vendor had sold the two holdings, namely Holding No. 31 and Holding No. 41 to the respondent. The respondent said he did, but the vendor said he did not. The affidavits filed by the parties are not in agreement. They are conflicting with one party contending one version whilst the other swore to the contrary. The documents on which the respondent relied as proof that the vendor did were disclaimed by the vendor as having been executed by him, and so should not have been relied upon by the learned judge to come to a final decision. In our view the learned judge was not entitled to reach a finding that the respondent was truly the registered owner without a proper trial of the issue. This question should be settled by proper evidence, which no doubt could be given and gone into when the trial of Malacca Civil Suit No. 126/1979 will be held. The existence of these caveats does in no way decide the rights of the respondent and those of the purchasers. They exist simply to maintain the *status quo* until the issue of fraud is settled. The respondent will not be in anyway prejudiced, although it may not be able to deal with these holdings as they wish to. Such impedient is not a real prejudice to the respondent as this is always a risk which any person takes or incurs when buying and selling property, even from or to a close friend.

In view of the conclusion we reach in these appeals, we do not consider it necessary for us to go into the question of indefeasibility of title under National Land Code (Penang and Malacca Titles) Act 1963, although counsel for both sides made some oral and lengthy written submissions on the subject. The question is premature at this stage of the proceedings.

In conclusion, we allow the appeals with costs and order that these caveats should remain to await the outcome of the Malacca Civil Suit No. 126/1979. For this reason we hope that this civil suit should be tried as soon as possible.

Appeal allowed.

Solicitors: *Sault & Co.; Tara Singh Sidhu & Co.*

MALAYAN BANKING BHD. v. AGENCIES SERVICE BUREAU SDN. BHD. & ORS.

[F.C. (Wan Suleiman Ag. C.J., Salleh Abas F.J. & Mohamed Azmi J.) December 7 & 18, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 207 of 1980]

Practice and Procedure — Document not adequately stamped — Guarantee — Power of court to impound document and order it to be admitted on payment of appropriate penalty — Point not raised in lower courts — Costs.

Stamp — Guarantee — Document not adequately stamped — Power of court to impound document and order it to be admitted on payment of appropriate penalty — Stamp Ordinance, 1949, ss. 52(1) & 53.

Evidence — Unstamped document — Guarantee — Power of court to impound document and order it to be admitted on payment of appropriate penalty.

In this case the appellant sued the respondent based on a guarantee given by the respondents in consideration of the appellant giving overdraft facilities to the first respondent. The guarantee was dated on April 17, 1974 but it was argued that it was in fact executed on November 16, 1973. The learned President of the Sessions Court after hearing the evidence was in real doubt as to when the guarantee was signed and he held that the plaintiff had failed to prove that the guarantee was valid and he dismissed the claim. On appeal it was held in the High Court that the guarantee was in fact executed on November 16, 1973. Hashim Yeop A. Sani J. held that as the penalty for late stamping had not.

been paid, the document was inadmissible. He therefore dismissed the appeal. The appellant appealed.

Held: (1) in this case the guarantee is not a document which falls under any of the categories mentioned in subsection (1) of section 47 of the Stamp Ordinance, in which case the prohibition is absolute, and therefore the document could be admitted in evidence in accordance with proviso (a) to section 52(1) of the Ordinance on payment of a penalty of $25/- under section 47 of the Ordinance;

(2) the guarantee document should therefore be impounded and the appellant should pay the penalty of $25/- to the Registrar who will send the sum together with the document to the Collector of Stamp Duty for stamping;

(3) as the decision in the case in the lower courts was solely based on the guarantee and on the admission of the guarantee in evidence, judgment in the sum prayed should be entered for the appellant;

(4) the history of the case showed that both parties were at fault in not pointing out that the document could be admitted in evidence on payment of the proper stamp duty and therefore each party should bear its own costs.

Cases referred to:-

(1) *Chop Tiong Kok Hang* v. *Hock Cheong & Co.* [1934] M.L.J. 74.

(2) *Navaradnam* v. *Suppiah Chettiar* [1973] 1 M.L.J. 173.

(3) *In re Coolgardie Goldfields Ltd.* [1900] 1 Ch. 475, 477.

(4) *Parkfield Trust* v. *Dent* [1931] 2 K.B. 579, 582.

(5) *Wirth* v. *Weigel* [1939] 3 All E.R. 712.

(6) *Hamilton Finance Co.* v. *Coverley Westray & Anor.* [1969] 1 Lloyd's Rep. 53.

(7) *Routledge* v. *McKay* [1954] 1 W.L.R. 615.

HIGH COURT.

Ong Kok Keng for the appellant.

Dulip Singh for the respondent.

Hashim Yeop A. Sani J.: The claim concerned the recovery of a sum of $3,907.37 being principal and interest on an overdraft facility through a letter of guarantee (P2). At the conclusion of the trial before the learned magistrate, the magistrate had what he called "a real doubt" as to when P2 was actually signed. PW1, the bank officer testified that from his file record it would seem that P2 was executed by the second defendant before it was posted to the Segamat Branch of the bank. According to third defendant (DW1) some time in November 1973 he was called by the manager of the bank in Segamat and he then signed P2 on November 16, 1973. He also said that when he signed P2 on November 16, 1973 the signature of the second defendant and the witness were already there and he was positive about this — pages 18-19 of the appeal record. If however P2 was executed on April 17, 1974 and stamped on April 18, 1974 the question of any penalty under section 47 of the Stamp Ordinance, 1949 does not arise. If, however, P2 was executed as borne out by the evidence on November 16, 1973 but stamped only on April 18, 1974 then it would be subject to payment of a penalty of $25 under that section of the Ordinance. PW1 admitted (at page 14) that P2 was executed before November 16, 1973 by the second defendant. He said "From my file record it seems that P2 was executed by Hardiah Singh (2nd defendant) before it was posted to our Segamat branch office." The testimony of DW1 would seem to corroborate this — pages 17-18. DW1 said "Sometime in November 1973 I was called by the manager of Malayan Banking at Segamat." ... "I signed document on 16.11.73 in the presence of Mr. Chew." ... "When I signed P2 on 16.11.73 the signatures of Hardiah Singh Sekhon and witness were already there." Therefore, a reasonable conclusion one could arrive at is that the material date of execution of P2 was November 16, 1973 and not April 17, 1974 as appearing on the face of the document. Section 52 of the Stamp Ordinance, 1949 directs that no instrument chargeable with duty shall be admitted in evidence or shall be acted upon unless such instrument is duly stamped. The words "duly stamped" is defined in section 2 of the Ordinance as meaning "an instrument bearing adhesive or impressed stamp of *not less than the proper amount* and that such stamp has been affixed or used in accordance with the law for the time being in force in the Federation." The words "duly stamped" was also explained in *Chop Tiang Kok Hang* v. *Hock Cheong & Co.*[1] referred to by Ong F.J. in *Navaradnam* v. *Suppiah Chettiar.*[2] Huggard C.J. said:

> "According to this definition, an instrument, in order to be duly stamped, must be stamped in accordance with the law for the time being in force in the Colony and I interpret this to mean that the instrument must bear a stamp of the proper value, it must be stamped in the proper manner with the proper description of stamp, and it must have been stamped at or within the time prescribed by law."

It was contended on behalf of the appellant that a ridiculous situation has arisen because even if at this stage the document (P2) is presented to the Stamp Office it would have been returned as properly and adequately stamped as stated by DW2, the Deputy Collector of Stamp Duty, Selangor. In my view what DW2 says is only valid for the purpose of looking at the document (P2) at face value. Since evidence has been adduced as to the probable date of execution of the document (P2) the learned magistrate had to make a finding as to the date of execution of the document. The magistrate did not however make a definite finding although he admitted having "real doubt". If the evidence had been examined properly and evaluation made the finding would be that the date of execution of P2 was November 16, 1973.

It follows that the document (P2) was not adequately stamped within the meaning of "duly stamped" as there was sufficient evidence to show that the document was presented for stamping beyond the period of thirty days prescribed in section 47 of the Stamp Ordinance and that the penalty of $25 had not been paid.

Section 52 of the Stamp Ordinance, 1949 is a clear direction in law that unless an instrument is duly stamped it shall not be admitted in evidence for any purpose until payment of the duty and the penalty if any chargeable under the law have been made unless the instrument is admitted for the purpose of any evidence in a criminal court or when the instrument has been executed by and on behalf of the government.

In this case the court was entitled to be satisfied on the face of the evidence adduced that P2 was receivable in evidence.

The appeal was therefore dismissed with costs.

From the above judgment the appellants appealed to the Federal Court.

FEDERAL COURT.

K. Thayalan (*Ong Kok Keng* with him) for the appellant.

Dulip Singh for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): This appeal arose from a guarantee dated at Kuala Lumpur on April 17, 1974 in which respondents Nos. 2 and 3 signed in consideration of the appellant granting overdraft facilities to respondent No. (1). Respondent No. (1) having failed to pay the debts, the appellant sued all three of them before the Sessions Court, Kuala Lumpur based on the guarantee. The appellant's case is solely based on this guarantee, the rejection of which deprived the appellant of the material evidence to prove its case. Respondent No. 3 on the other hand contended that the guarantee was invalid because it was not duly stamped as it was not executed on April 17, 1974 as it was dated but on November 16, 1973. Thus the date of its execution became very vital. During the trial before the President of Sessions Court Kuala Lumpur the guarantee was admitted and marked as exhibit P2. No objection was taken by anyone as to its admissibility and the trial revolved around the issue of fact as to the date of its execution. There was a clear evidence given by plaintiff's witness P1 that exhibit P2 was executed on November 16, 1973 and not on April 17, 1974. But contrary to this, the Deputy Collector of Stamp Duty (DW1) testified that as far as he was concerned the document was executed on April 17, 1974. Because of the apparent contradiction the learned President therefore became uncertain and stated in his grounds of judgment that he was left in "a real doubt" as to when the guarantee was signed. Consequently he held that the plaintiff failed to prove that the guarantee was valid and as such dismissed the case with costs.

On appeal before Mr. Justice Hashim Yeop A. Sani the "real" doubt entertained by the learned President as to the date when P2 was signed was resolved by the learned judge in that in view of the evidence of PW1 and respondent No. (3), i.e. DW1 the date of the execution was November 16, 1973 and not April 17, 1974 as appearing on the face of the document. The view of the Deputy Collector of Stamp Duty (DW2) as to the correctness of the stamping was clearly based on his erroneous assessment of fact as to the date of execution of the guarantee exhibit P2. Such view could be disregarded. The learned judge further held that as the guarantee exhibit P2 was stamped on April 18, 1974, some five months after execution it should be subject to a penalty of $25 under section 47 of the Stamps Ordinance, 1949 and that as the penalty was not paid, by virtue of section 52 the document was clearly inadmissible. He therefore dismissed the appeal with costs. We could find no fault with this ruling.

Before us Mr. K. Thayalan the leading counsel for the appellant who did not appear in the courts below submitted that he now accepted that the guarantee exhibit P2 was executed on November 16, 1973 and therefore not duly stamped but he urged us to impound and admit the document on the basis of a well-known professional practice of the General Council of the Bar in England in that except in revenue cases counsel should not object to the inadmissibility of the instrument on account of lack of stamp unless such defect goes to the validity or the root of the document, such as bill of exchange or a promissory note.* Counsel therefore submitted that the courts in this case should have impounded exhibit P2 under section 51 of the Ordinance and admit it under proviso (a) to section 52(1) subject to payment of penalty in accordance with section 53 and that as the two courts below did not exercise this power he submitted that we should do so and enter judgment for the appellant.

We are glad at last counsel for the appellant accepted that the guarantee exhibit P2 was executed on November 16, 1973 and therefore not duly stamped instead of fighting the issue, as his junior colleague had done in both the Sessions Court and the High Court despite clear evidence to the contrary including the appellant's own witness (PW1). However, in order to consider the new submission as to whether the court should have impounded the exhibit, we must examine the implication of section 52(1). This section enacts: —

"52(1): No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered, or authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided that —

(a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of the duty and the penalty, if any, chargeable in respect thereof under the provisions of section 43 or section 47 of this Ordinance;

(b) ....

(c) ...."

It is clear that under this section except for certain types of instruments prohibition against admissibility of an instrument on account of not being duly stamped is not an absolute prohibition but conditional on payment of a duty or a penalty, if any, under sections 43 and 47. The duty and the penalty required to be paid under section 43 are those in respect of a bill of exchange or cheque or promissory note drawn outside Federation, whilst the duty and the penalty required to be paid under section 47 are as regards instruments other than those stated in paragraphs (a), (b) and (c) of subsection (1) of the section namely:

"(a) a bill of exchange, cheque or promissory note drawn or made within the Federation; or

(b) a receipt for money or other property the amount or value of which exceeds twenty dollars; or

(c) a power or letter of attorney for the sole purpose of appointing or authorising a person to vote as proxy at one meeting only of a company or association,"

* Sergeant on Stamp Duties 6th Ed. p. 54.

Thus it is clear that as to an instrument falling under any of these three categories the prohibition against admissibility is absolute. Unless it is stamped before or at the time of its execution as provided in section 41 there is no way in which it could be admitted under proviso (a) to section 52(1). In other words the prohibition is absolute or goes to the root or validity of the instrument. It is for this reason that in the case of *Navaradnam* v. *Suppiah Chettiar*[2] no issue was raised or could possibly be raised that a promissory note rejected for lack of stamping should be impounded and admitted on payment of proper stamps. Proviso (a) to section 52(1) simply does not cover such document. In the present case, however, the guarantee exhibit P2 is not a document which falls under any of the three categories mentioned in subsection (1) of section 47, and that being the case, exhibit P2 could be admitted in evidence in accordance with proviso (a) to section 52(1) on payment of a penalty of $25 under section 47 of the Ordinance.

The purpose of the Stamp Ordinance 1949 is to impose and to collect taxes on legal and commercial documents by compelling these documents to be stamped on pain of being inadmissible. The Ordinance provides that payment of duty can be made before or at the time when documents are executed, and even later except for certain type of documents. The duty must be paid within 30 days of execution or even on a later date when the documents are used provided that an appropriate penalty is paid. Failure to pay the duty or the penalty prevents the use of the instrument. If the use is intended for a judicial proceeding the document is not admissible until the duty or the penalty is paid, unless the document belongs to special categories stated earlier. To ensure that the duty is paid section 51 imposes an obligation on those whose function is to receive evidence including the courts to be specially vigilant to see whether a document produced before them is duly stamped or not. If it appears to be unstamped the authority concerned has no choice but to impound the document and admit the same on payment of the necessary duty or penalty under proviso (a) to section 52(1) and thereafter send the impounded documents to the Collector of Stamp Duty together with the duty or penalty for stamping under section 53.

Because a stamp objection really relates to the need of safeguarding Government revenue, the practice in England regarding an unstamped document is that the court will admit such document upon payment of the necessary duty or penalty, if any, unless of course the lack of stamping goes to the root or the validity of the document itself or the case is a revenue dispute. Further the General Council of the Bar also ruled that it is unprofessional for an advocate to make a stamp objection in those two cases, i.e. revenue cases and cases in which lack of stamping goes to the root or validity of the document. As early as 1900 *In re Coolgardie Goldfields Ltd.*[3] Cozens-Hardy J. observed: —

"Notwithstanding the express language of section 14 of the Stamp Act, 1891, it is the settled practice to allow an unstamped document to be used upon the personal undertaking, not of the parties to the action, but of solicitors who are officers of the court, to stamp it and to produce it so stamped before the order is drawn up."

In *Parkfield Trust* v. *Dent*[4] an unstamped memorandum of contract was admitted to prove the plaintiff's case upon his solicitors undertaking to stamp the memorandum and to pay penalties on it. Similarly in *Wirth* v. *Weigel*[5] an unstamped instrument in the nature of guarantee was also admitted upon the plaintiff's counsel's undertaking to pay the stamp duty and penalty, if any. On the other hand in *Hamilton Finance Co.* v. *Coverley Westray & Anor.*[6] the court rejected five bills of exchange because they were not stamped before acceptance. Such bills under section 38(1) of the Stamp Act 1891 of U.K. could not be made available for any purpose whatsoever, nor could the holder thereof recover thereon. In other words lack of stamping went to the root or the validity of these bills.

In this country similar situation should prevail in view of the responsibility of the court under section 51 to impound unstamped documents and to admit them under proviso (a) to section 52(1) on payment of stamping duty or penalty, if any. As regards the question whether the Bar Council in this country would consider any of its members as being unprofessional for raising a stamp objection, this is a matter entirely left to that body to decide. As far as the court is concerned the court is under an obligation, and solicitors and counsel appearing before it as officers of the court are also under an obligation, to draw the court's attention to its powers under section 51 and section 52(1), including its provisos.

Thus in our view the court should impound the guarantee exhibit P2 for lack of stamping and order it to be admitted on payment of an appropriate penalty. The fact that this course of action had escaped the attention of the two courts below is immaterial, because the operation of sections 51 and 52 does not cease there, but continues right up here. In *Routledge* v. *McKay*[7] the Court of Appeal in England held that if the lower court had overlooked a stamp point, the Court of Appeal may take notice of it.

The next point for us to consider is the question of costs. In the Sessions Court, there was a great deal of confusion regarding the validity and the admissibility of the exhibit P2. It was the contention of the respondent No. 3 that lack of stamping renders the document unenforceable and null and void (see paragraph 4 of statement of defence). This led the learned President of Sessions Court to hold in his grounds of judgment that the "plaintiff's case would stand or fall on the validity or otherwise of P2". Mr. Ong Kok Keng who appeared for the appellant further added to this confusion by tacitly accepting this proposition of law and so fought the case on the basis of fact, namely that exhibit P2 was not executed on November 16, 1973, but on April 17, 1974 and therefore in order, despite the fact that his own witness (PW1) — not to say respondent No. (3) himself (DW1) — said otherwise. He seemed to have been misled by the opinion of the Deputy Controller of Stamp Duty (DW2) as to the correctness of the stamping of the exhibit, but little did he realise that such opinion was based on an erroneous assessment of fact as to the date of the execution of exhibit P2 and therefore of little value. Counsel therefore made no

attempt to submit to the learned President to impound the exhibit P2 under section 51 and admit it under proviso (a) to section 52(1), if the learned President found that the date of the execution was on November 16, 1973. The case was thus fought on the footing that lack of stamping rendered the document invalid. Let us remind ourselves that it is not so. The exhibit is perfectly valid, but merely becomes inadmissible unless the stamp duty is paid.

When the case came before Mr. Justice Hashim Yeop A. Sani, Mr. Ong Kok Keng repeated his stand in the Sessions Court. He submitted that the date of execution of exhibit P2 was on April 17, 1974 and therefore the document was in order. He made no alternative submission that if the learned judge was not with him the learned judge should use his power under section 51 to impound the exhibit with a view to admitting it in evidence. It is therefore not surprising that the learned judge ruled that the document was not properly stamped and therefore not admissible. It is only before us that Mr. K. Thayalan made this submission that we should impound the document.

The history of this case clearly shows therefore that both parties were at fault with counsel for the appellant sharing a greater part of it. Thus we feel that both parties should bear their own costs here and in the two courts below. Subject to that the appeal is allowed.

The proper order which we should make in this case is that (a) the guarantee exhibit P2 is impounded and (b) the appellant must pay the penalty of $25 to the Registrar who will send the sum together with the exhibit to the Collector of Stamp Duty for stamping, (c) the judgment in the sum prayed should be entered for the appellant (d) both parties are to bear their own respective costs both here and in the two courts below and (e) the stamping of the guarantee exhibit P2 in accordance with section 53 must first be done before the order is drawn.

Order accordingly.

Solicitors: *Yazid Baba & Co.; Dulip Singh & Co.*

YAHAYA BIN MAT & ANOR. v. ABDUL RAHMAN BIN ABU

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat F.J. & Abdoolcader J.) January 4, 1982]

[Penang — Federal Court Civil Appeal No. 246 of 1979]

Practice and Procedure — Appeal — Apportionment of liability — Breach of Highway Code — Evidence misconstrued by trial court.

Road Traffic — Breach of Highway Code — Liability apportioned.

In this case the respondent sustained injuries in an accident when a taxi driven by the first appellant as the servant or agent of the second appellant collided with the bicycle he was riding in Pulau Langkawi. He brought an action for damages against the appellants. The learned trial judge apportioned liability for the accident on the basis of 30% and 70% against the respondent and the appellants respectively and awarded general damages on the basis of 100% liability in the sum of $18,000 being $16,000 for pain and suffering and loss of amenities and $2,000 for loss of future earnings. The appellants appealed to the Federal Court.

Held: (1) in this case the respondent who admitted his vision was blurred because of the heavy rain and by the open umbrella he was carrying in his right hand sideways and that he had no time to avoid the oncoming taxi was clearly in breach of the provisions of rules 56, 59 and 60 of the Highway Code. These are matters which should have been taken into consideration for the purpose of establishing liability under the provisions of section 59(4) of the Road Traffic Ordinance, 1958 but the learned trial judge regrettably held that this by itself did not amount to negligence;

(2) on the evidence as a whole it might well have been that the first appellant in taking the bend went slightly over the centre of the road but this did not necessarily indicate total or preponderant liability as had the respondent not been taking a risk in riding his bicycle in heavy rain and holding an open umbrella in his right hand the first appellant could have avoided the collision even in such circumstances;

(3) in all the circumstances although the first appellant was not entirely free from blame the liability apportioned by the learned judge was not justified on the evidence and the facts of the case and should be varied to two-thirds liability on the part of the respondent and one-third liability on that of the first appellant.

Case referred to:-

(1) *Kosnan* v. *Phua Huat Choy* [1966] 2 M.L.J. 233.

FEDERAL COURT.

P.R. Manecksha for the appellants.

Baldev Singh Bhar for the respondent.

Abdoolcader J. (delivering the judgment of the Court): This appeal involves a claim by the respondent for personal injuries sustained in an accident when a taxi No. AF 2318 driven by the first appellant as the servant or agent of the second appellant on October 25, 1974 collided with the bicycle he was riding in Pulau Langkawi. The respondent was an infant at the material time and when the writ in these proceedings was taken out but has since come of age. It is not necessary to set out the facts of the matter as they appear in the judgment of the learned trial judge who apportioned liability for the accident on the basis of 30% and 70% against the respondent and the appellants respectively and awarded general damages on the basis of 100% liability in the sum of $18,000 being $16,000 for pain and suffering and loss of amenities and $2,000 for loss of future earnings. Special damages had been agreed at $376 and in the result on the basis of this apportionment the respondent was awarded $12,600 as general damages with interest at 6% per annum except in respect of the loss of future earnings and $253 special damages with interest at 3% per annum and costs.

The appellants appealed to this court on the apportionment of liability and assessment of damages and the respondent as a protective measure, we should think, cross-appealed. We upheld the appellants' appeal on the question of liability and held the appellants one-third and the respondent two-thirds to blame, increased the quantum for loss of earning capacity on the basis of 100% liability to $5,000 and in the event awarded the respondent $7,000 as general damages. The appellants' appeal was accordingly allowed with costs to this extent and the cross-appeal by the respondent dismissed with costs. The respondent then applied to this court for conditional leave to appeal against our decision to His Majesty the Yang di-